EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-1002

No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

RICHARD G. KASCHAK,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN
Respondent,

PINE MOUNTAIN CLUB PROPERTY
OWNERS ASSOCIATION
Real Party
In Interest.

ON PETITION FOR WRIT OF
CERTIORARI IN THE CALIFORNIA
COURT OF APPEAL FOR FIFTH
APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

RICHARD G. KASCHAK
1928 Carmen Avenue
Hollywood, Calif.
90068 (business adr.)
(213) 462-8803
Pro Se Petitioner

December 15, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Is it not a violation of Due Process Of Law (14th Amendment, U.S.C.A.) to invalidate a homestead declaration in a summary proceeding on three hearsay declarations; the declarants of which are not otherwise present in court for confrontation and cross-examination?

2. Is it not a violation of Due Process Of Law (14th Amendment, U.S.C.A.) for an Appellate Court to ignore and to otherwise omit, without any reference, an issue raised on appeal about the correctness of a summary proceeding based solely on hearsay; the effect of which was to deprive Petitioner of his Homestead Exemption granted by California Law?

3. Are not the two errors above, considered in combination, a denial of Due Process Of Law (14th Amendment, U.S.C.A.)?

4. Does not Due Process Of Law require an impartial decision Maker?

5. Is the time ripe for the Supreme Court Of The United States to review and to protect defendant's in pro per Due Process Of Law rights from lower court abuse?

LIST OF PARTIES

The parties to the proceedings are those that appear on the caption of the case pursuant to Rule 14.1 (b).

Richard G. Kaschak, Petitioner in Pro Per.

Superior Court Of California, Appellate Dept, County Of Kern, Respondent.

Pine Mountain Club Property Owners' Association, Real Party In Interest. Their legal counsel and law firm noticed to petitioner on October 22, 1990, is Dixon Kummer of the law offices of Borton, Petrini, & Conron.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

RICHARD G. KASCHAK,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FIFTH APPELLATE DISTRICT.

The petitioner, Richard G. Kaschak respectfully prays that a writ of certiorari issue to review the denial for request for petition for writ of certiorari of the California Court Of Appeal for the Fifth Appellate District, entered and filed in the above entitled proceeding as follows:

1st petition dated April 18, 1990

2nd Petition dated May 14, 1990

3rd Petition dated July 7, 1990

The Supreme Court of the State of California denied petitioner's petition for review on September 19, 1990.

OPINIONS BELOW

The opinion of the Superior Court, Appellate,Department, State of California, County of Kern, is re-typed in the appendix hereto, page 3a infra.

The opinion of the Justice Court, County of Kern, State of California is also in the appendix hereto page 1a.

JURISDICTION

Petition to the Court Of Appeal of the State of California for the Fifth Appellate District was denied on May 3, 1990, and on August 9, 1990.

Petition For Rehearing to the Court of Appeal was erroneously & falsely accepted by the Court Of Appeal and denied on May 31, 1990. This action was rebuked by California Supreme Court; ordered refund of petitioner's monies.

Petition For Review of Decision Of The Court Of Appeal of the State of California for the Fifth Appellate District was made to the Supreme Court of the State of California on August 17, 1990. On September 19, 1990, the Supreme Court Of The State Of California, DENIED petitioner's petition for review.

This petition for certiorari is filed within 90 days of September 19, 1990, and the Supreme Court Of The United States jurisdiction is invoked under Title 28, United States Code, Chapter 81, Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT, United States Const:

> "Section 1....nor shall any State deprive any person of life, liberty, or property without due process of law..."

CALIFORNIA CODE OF CIVIL PROCEDURE:
ARTICLE 5. DECLARED HOMESTEADS

Sec. 704.910 Definitions

Sec. 704.920 Selection Of Declared Homestead

Sec. 704.930 Homestead Declaration, Contents, Execution, Facts; Authority

Sec. 704.950 Judgment Lien and Attachment

"...A judgment lien on real property.....does not attach to a declared homestead."

(1) "...declared homestead was recorded prior to time of the judgment."

Sec. 704.730 Amount of Homestead Exemption

(1) $30,000

(2) $45,000

STATEMENT OF THE CASE

During the year of 1979, Petitioner, Richard G. Kaschak, built a 2-bedroom 2-bath home at Pine Mountain Club, a rural housing development in Frazier Park, County of Kern, State of California; approximately 65 miles north of the city of Los Angeles, California. The area is wooded and mountainous, and by Los Angles standards considered as remote.

This fee simple land is encumbered by Pine Mountain Club Property Owners Association, Inc., and annual dues were paid to real party in interest until the time in question.

After a dispute over director's violation of the covenants & conditions by Pine Mountain Club, Petitioner, Kaschak, with-held dues payments from this breaching organization.

Real Party In Interest (Plaintiff) then commenced an action against Petitioner in the Maricopa-Taft Justice Court . This is a statutory court with jurisdiction up to $25,000 (CCP Sec. 86).

A judgment resulted against petitioner in the amounts of $3,349.87 (back dues) and $8,406.62 undocumented attorney fees; thus for a total judgment of $11,815.49. This judgment was filed on July 11, 1986. The judgment provided that it be lien against petitioner's Pine Mountain home property and that it be sold by the Marshall.

However, petitioner had previously filed a Declaration Of Homestead on September 17, 1982; pursuant to CCP Sec. 704.730 et seq. which provides, inter alia, that a judgment shall not be a lien on a declared homestead; that the homesteaded property is exempt from execution for amounts up to $45,000. Thus the Marshall did not hold a sale of petitioner's validly declared homesteaded home.

There then followed on August 15, 1988, a Motion in the Justice Court "to invalidate" petitioner's valid homestead declaration on the grounds that petitioner did not "reside" at the property (14409 Voltaire Drive, Pine Mt. Club, Frazier Park, California, 93225), as required by CCP Sec. 704.910.

An application to sell petitioner's home was simultaneously filed with the motion; both were heard on August 15, 1988.

The motion and application were merely supported by four (4) declarations:

(1) A declaration of Debra Tilson Lambeck, (trial attorney for Pine Mt. Club) setting forth the legal status of the property;

(2) A declaration of Richard McMillan a "part time resident" of Pine Mt. Club; stating that petitioner is in residence

only "several week-ends during the year";

(3) A declaration of Mel McColloch, chief operating office of Pine Mt. Club Association, stating that petitioner gave a Hollywood address for mailing purposes, and

(4) A declaration by J. Ace Carter, a PAID for private investigator (for trial attorney Debra Tilson Lambeck for Pine Mt. Club) who stated that petitioner's voter registration of 1970 showed a Hollywood, California address. (Note: Petitioner's home was not built until December 1979)

The motion to invalidate the homestead declaration and to order the sale of the Pine Mt. homesteaded property was continued to October 28, 1988, before the same Judge who rendered the judgment against the petitioner.

At this motion hearing, no new evidence was produced; the declarants themselved DID NOT appear, and the Justice Court decided the motion on the arguments of Pine Mt. Club counsel and the hearsay declarations.

Petitioner represented himself at the motion hearing and attempted to refute Pine Mt. Club's (Plaintiff) declarations. FIRSTLY: The declaration of Richard McMillan was not true because his house is more than a block away from petitioner's homesteaded home; separated by several houses and huge pine trees. Thus it was physically impossible for McMillan to express the opinion that he did in his declaration. Additionally, McMillan was at that time President of Pine Mt. Club Property Owners Assoc; the very group which obtained the judgment against petitioner. Plainly he was a biased & prejudiced party, and his declaration was perjured.

SECONDLY: Petitioner proved in Court that

Club government operated post office; contrary to the declaration of Mel McColloch who testified that petitioner had a Hollywood mailing address. Furthermore, McColloch had only been at Pine Mt. Club for approximately 6-months; he never asked petitioner for a local mailing address.

At no time did any of the declarants appear personally in the Justice Court to testify despite the fact that the Judge placed Petitioner under oath for testimony and offered Pine Mt. Club's attorney the opportunity to cross-examine petitioner.

And on December 14, 1988, the Justice Court ruled in Pine Mt. Club's favor; ordering the sale of petitioner's validly declared homesteaded home to pay the judgment in favors of the Pine Mt. Club Association.

Petitioner, pursuant to applicable California law, then appealed to the

Appellate Department of the Superior Court, a higher trial court, but sitting as an appeals court. Petitioner there argued that the procedure followed below was improper; especially since it denied petitioner the right to confront and cross-examine the witnesses against him.

Nevertheless, the Superior Court affirmed the Justice Court in an opinion which made no reference to; and did not consider petitioner's argument that he was entitled to cross-examine the witnesses against him before his homestead home was sold outright by the marshall.

Petitioner then filed two separate petitions for writ of certiorari with the Court Of Appeal, Fifth Appellate District, State Of California; both of which raised as an issue the failure of the Superior Court to address issues raised before them; again rasing the issue that petitioner had been denied his right of cross-examination.

Yet both petitions (May & August) were denied by the California Court Of Appeal. In fact a Petition For Rehearing (May 31, 1990) was erroneously & falsely accepted (along with filing monies) by this Court Of Appeal; later rebuked and corrected by the California Supreme Court; ordered refund of petitioner's monies.

Petitioner's subsequent Petition For Review by the California Supreme Court was denied by order of September 19, 1990.

ARGUMENT FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

Petitioner, Richard G. Kaschak, is representing himself in propria persona. He has attempted throughout this proceeding to voice, however inarticulately, that his real property was being taken by the Court for the benefit of his creditors without due process of law; a summary disposition supported only by hearsay without the right to confront and cross-examine the witnesses against him.

This error was compounded by the Appellate Courts which affirmed a judgment and denied relief without passing on the petitioner's argument that he be entitled to cross-examine the perjured declarations of respondent's case. But respondent failed to produce witnesses and petitioner's real property was taken; virtually forfeited and seized, based on a mere hearsay declaration alone.

Petitioner was in compliance with CCP Sections: 704.910, 704.920, 704.930, and 704.950 pertaining to declared homestead law.

I.

DUE PROCESS REQUIRES

CROSS-EXAMINATION

The Petitioner raised the specter of perjury and impossibility about respondent's proof from the earliest moment. Yet the Justice Court found for respondent on those declarations alone.

(a)

STATE ACTION

As the 14th Amendment to the Constitution Of The United States is a limitation on State Action only, nonetheless it is clear that this action may be found by a State Court enforcing a private right. Such was the case in New York Times v Sullivan, 376 U.S. 254 (1964), and more recently, and more in point, in Sniadach v Farily Finance Corporation Of Bay View, 395 U.S. 337 (1968), which nullified a state law providing for a creditor's pre-trial garnishment of wages.

Similarly, here, to the extent court rules allow a summary disposition of real property, State Action is also involved.

(b)

HEARSAY IS NOT SUBSTANTIAL EVIDENCE

Insofar as the judgment below rests upon the hearsay declarations alone, it is clear that this fact by itself raises a due process problem. This Court has held that "mere uncorroborated hearsay or rumor does not constitute substantial eivdence." Consolidate Edison Co. v N.L.R.B., 305 U.S. 197 (1938). Plainly there are no exceptions to the hearsay rule applicable here. So, we are then talking about unreliable, untrustworthy evidence, i.e. the rationale for the exclusion of hearsay evidence.

Put differently, in an adversary

the decision maker's conclusion rest solely on the legal rules and the evidence adduced at the hearing. Thus In Re Japanese Electronics Products Antitrust Litigation, 631 F2d 1080, 1084, (3 Cir 1980). (Emphasis supplied)

Clearly, if the declarations are untrustworthy, the only, or principal way to show this is by cross-examination. But where the witnesses do not appear, this line of defense is precluded. Yet this Court has held that Due Process requires that there be an opportunity to present every available defense. American Surety Co. v Baldwin, 287 U.S. 156, 168 (1932).

This case is not like a school discipline where the mere opportunity to be heard in opposition to reports and advice of other alone satisfies the Due Process requirements. Goss v Lopez, 419 U.S. 565 (1975). Nor is it a case where No Trial type hearing is required at all. Cafeteria & Restaurant Workers Union v Mc Elroy, 367 U.S. 886 (1961).

This is not a case where a governmental entitlement is being revoked. The case is clearly one of taking private property by summary proceeding; where the right to probe the declarants for bias and prejudice by cross-examination is foreclosed, and which, therefore, raises Due Process questions. Ellis v Capps, 500 F2d 225 (5 Cir. 1974).

Due process requires that petitioner have the right to fully and fairly litigate each issue in his case. Du Pont v Southern National Bank, 771 F2d 874, 880 (5 Cir. 1985).

When the issue turns on credibility, as it does here, a plenary fact finding procedure must be had immediately. Ali v I.N.S., 661 F Supp, 1234,1250, (D. Mass, 1986). To deny a full defense on the issues is a denial of Due Process. Western Electric v Stern, 544 F 2d 1196, 1199 (3 Cir, 1976).

(c)

DUE PROCESS REQUIRES THE RIGHT TO CROSS EXAMINE WITNESSES IN CIVIL CASES

While we have found no Supreme Court case holding the propostion here advanced, it is generally believed and widely taught that Due Process requires a right to cross-examine witnesses even in a civil action. Nowak, et al, Constitutional Law 2d Ed (1983), at 555-556.

But several lower courts have had no problem expressing the point. Therefore, the Third Circuit has opined that the right to cross-examination inheres "in every adversary proceeding", and if such examination of an available witness is denied, the litigant has been deprived of Due Process. Derewecki v Pennsylvania Railroad Co., 353 F 2d 436, 442 (3 Cir 1965).

Similarly, the Eighth Circuit has declared that a party has a right to cross-examine available witnesses; otherwise

the litigant is deprived of Due Process. Nevels v Hanlon, 656 F 2d 372, 376, (8 Cir. 1981). (There is no indication that the witnesses here were unavailable. And in a case not entirely dissimilar from the present one, the Seventh Circuit has held that pre-filed declarations are no substitute for the witnesses being sworn in open court; identifying their testimony as their own, and being subject to cross-examination.

To make findings on hearsay declarations alone is a denial of Due Process. Chicago Ridge Theatre Limited Partnership v M & R Amusement Corp. 855 F 2d 465, 468 (7 Cir. 1988).

(d)

GOLDBERG V. KELLY REQUIRES A PLENARY HEARING

Above we argued that Due Process requires, negatively, that a judgment not be based on hearsay alone; that even a summary proceeding requires the right to confront and cross-examine witnesses.

Here we seek to show that a summary proceeding, such as below, does not meet the requirement of Due Process as articulated by this Court.

More particularly, attention is directed to Matthews v Eldridge, 424 U.S. 319 (1975) which developed a weighing test for determining when and what kind of hearing Due Process requires; characterized as a utility test. Nowak, supra, at p 555. But the base line of Matthews is that Due Process guarantee is one of fairness; that the process employed will be fundamentally fair in the resolution of factual and legal disputes. Ibid, at p 335.

Presaging the Matthews test, however, was Goldberg v Kelly, 397 U.S. 254 (1970) which required an administrative hearing before welfare benefits were terminated. But in expressing the plurality opinion, Justice Brennan showed that the question was whether the recipient's interest outweighed the government's in summary adjudication. Furthermore, in determining that a prior hearing must be held, the Court had no difficulty in describing the kind of hearing to be had; that is the recipient was entitled to be heard in a "meaningful manner." Ibid, at 267.

This meant that the litigant was to have an effective opportunity to defend "by confronting any adverse witness" and having the right to cross-examine any such witness. Ibid, at 268.

But the court went even further, declaring as if foreseeing the present case; that "particularly where credibility and veracity are at issue, written submissions are a wholly unsatisfactory basis

for decision." Ibid, at 269 (Emphasis supplied)

Clearly, this language applies to the present case. Surely the deprivation of real property; representing a life's savings, is no less important than a welfare recipient's right to support.

Justice Brennan concluded by saying that "in almost every setting where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine witnesses." Ibid at 269. (Emphasis supplied.)

Plainly Goldberg required the respondent in this case to produce its witnesses for testimony under oath in open court and subject to petitioner's right to cross-examine them to meet the requirement of Due Process.

II.

THE FAILURE OF THE APPELLATE COURT TO CONSIDER THE QUESTION REQUIRES REVERSAL

As pointed out above, petitioner argued that the California Appellate Court ignored and omitted to consider the issue he raised on appeal that the hearsay declarations and the lack of opportunity to cross-examine the declarants deprived him of Due Process under law.

Here the California Constitution requires only the Court Of Appeal and the Supreme Court to render their decisions in writing. California Constitution, Article VI, Sec. 14.

The Superior Court, even when sitting as an Appellate Court is not required to do so. But certainly almost all the recent cases require the decision maker to issue reasons for his decision. See e.g., Goldberg, supra.

As a corollary to this rule, it seems clear that the decision should consider the defense and at least refer to it, if not directly pass on it. Could it be that a governmental administrative agencies are to be held to a higher standard than Constitutional Courts of the States, constituted specifically as Courts Of Appeal? Even if it is to say the the other contentions of counsel do not merit discussion, such an indication would at least indicate the the Appellate Court analyzed all contentions on appeal before reaching a conclusion. See People v Rojas, 118 Cal App 3d 278, 290 (1981).

When in combination with hearing error, the Court Of Appeal ignores the contention about the very same error, can it be said that Petitioner has received Due Process of law?

III.

IT WAS A DENIAL OF DUE PROCESS FOR THE JUDGE NOT TO REVEAL HIS RELATIONSHIP TO A PRINCIPAL WITNESS

After the Justice Court hearing was concluded, Petitioner discovered in the loca newspaper that both the trial judge, Robert Deabenderfer, and declarant Mel McColloch (declarant against petitioner) attended a political testimonial dinner together. Petitioner had no knowledge at the time of the hearing that the two knew each other; but learned only after the trial when the article appeared in the local newspaper.

Petitioner raised the possibility of prejudice by the trial court on his appeal to the Superior Court. However, the Court said that it was raised too late. But petitioner could not have raised it sooner as he did not suspect

the Judge and the witness (non-appearing declarant) knew each other.

In such cases, however, this Court has held that "Justice must satisfy the appearance of Justice" even if the judge has no actual bias. The right to an impartial and disinterested tribunal is a guarantee of the Due Process Clause which applies equally to criminal and civil trials. Marshall v Jerrico Inc., 446 U.S. 238.

IV.

DEFENDANT IN PRO PER DUE PROCESS ABUSE BY THE LOWER COURTS IS AN ISSUE RIPE FOR REVIEW BY THE SUPREME COURT OF THE UNITED STATES

A defendant in pro per should not be abused and taken advantage of because of the intricate and complex court system and its legal procedures.

Just because an in pro per (who cannot qualify as and indigent or in forma pauperis) party cannot afford the "high priced" legal minds and counsel in this modern day and age, there is no excuse and/or right for Lower Courts and plaintiff's attorneys to abuse the in pro per defendant in the lawsuit.

The in pro per party may represent millions of the American citizenry who might be real property owners, homesteaders, war veterans, senior citizens, and/or social security recipients. The Court system must protect these in pro

per citizens to the fullest to guarantee "due process" and a fair and impartial hearing; whether in a Justice Court, or in a Superior Court, Appellate Department.

Decision makers are less likely to be biased and/or prejudiced against an attorney at law as compared to a party in pro per. Judges improper conduct and/or bias would immediately be challenged and objected to by a learned counsel; whereas a humble in pro per party wishes to respect and trust in the fairness, wisdom, and honesty of His Honor.

Petitioner had in fact complied with California Code Of Civil Procedure Sections: 704.910, 704.920,704.930, and 704.950 pertaining to declared homestead law.

Petitioner in his written brief and in his oral argument had cited 11-precedent stare decisis California law citations dealing with California

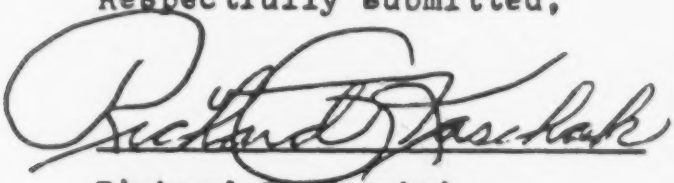
homestead law protection. However the Appellate Court refused to discuss and/or respond either to the written brief and the oral argument in the Court's Opinion. Yet these vital cases stated that "the homestead must be protected to the fullest extent, and the creditor's power to attack it by execution or forced sale must be strictly limited to the cases specified in the homestead law." (Vieth v Klett, 88 CA 2d 23, 198 P2d 314).

Thus Pro Se Petitioner asks: Is the time ripe for the Supreme Court Of The United States to review and to protect defendant's in pro per Due Process Of Law rights from Lower Court abuse?

C O N C L U S I O N

For all of the foregoing reasons Pro Se Petitioner, Richard G. Kaschak, asks the Court to grant the Petition For Certiorari, and upon review to reverse the judgment.

Respectfully submitted,



Richard G. Kaschak
Petitioner In Pro Se
Business Address:
1928 Carmen Avenue
Hollywood, Calif. 90068
(213) 462-8803

DATED: December 15, 1990

APPENDIX

MARICOPA TAFT JUSTICE COURT
COUNTY OF KERN, STATE OF CALIFORNIA

Pine Mt. Club Property Owners Assoc., Inc., Plaintiff, vs Richard G. Kaschak, Defendant.	Case No. CJ 193 Rulings of the Court Re: 1) Plaintiff's Motion To Invalidate Homestead & 2) Application for Order of Sale of Defendant's Dwelling

This cause having come on regularly to be heard the 28th day of October 1988, plaintiff appearing by and through their legal representative Art Santan and defendant appearing in propria persona.

Evidence both oral and documentary being submitted and argument heard thereon the court finds as follows:

1) That there is an overwhelming amount of evidence indicating that the defendant's dwelling in Pine Mountain was not used as his principle place of residence which is one of the essential elements concerning a homestead exemption and the court finds that under CCP704 et seq, that defendant's homestead declaration is invalid.

The court further rules on the application for an order concerning the sale of defendant's property in the affirmative and as follows:

Defendant, Richard G. Kaschak shall file an undertaking double the amount of judgment or in the alternative a surety bond one and one half times the amount of plaintiff's judgment within 30 days; that if no undertaking or bond is filed herein plaintiff shall proceed with the sale of defendant's property as prayed for in their application. Order of sale pursuant to CCP701.510.

Judge, Robert C. Deabenderfer

Dated 12-14-88

IN THE APPELLATE DEPARTMENT
COUNTY OF KERN
CALIFORNIA

PINE MT. CLUB PROPERTY OWNER'S ASSOCIATION, Plaintiff & Respondent; vs. RICHARD G. KASCHAK, Defendant & Appellant	No. A-415 Trial Court No: CJ 193 OPINION

Appeal from an order of the Maricopa-Taft Justice Court, Honorable Robert C. Deabenderfer, presiding, declaring defendants Homestead Declaration invalid.

Counsel for appellant, Richard G. Kaschak, in propria persona.

Counsel for respondent, Monteleone & McCrory by Art Santana.

FACTS

On July 11, 1986, plaintiffs obtained Judgment against defendant for $11,815.49. The judgment was for delinquent assessments pursuant to certain covenants and conditions on a lot owned by defendant within the Pine Mountain Club.

Defendant appealed the judgment; the

On July 19, 1988, plaintiffs in an effort to satisfy the judgment filed a motion to invalidate a homestead exemption being claimed by appellant on the dwelling located on said lot at 14409 Voltaire Drive, Pine Mountain Club, California.

On December 14, 1988, after having heard evidence on said motion, both oral and documentary, Judge Deabenderfer ruled defendant's Homestead invalid.

A timely appeal of said ruling followed.

ARGUMENT

1) Appellant contends the Justice Court had no jurisdiction in declaring the Homestead invalid. Appellant cites California authority giving only the Superior Court jurisdiction to enforce a lien on real property. Appellant's reliance on Article VI, section 5, is misplaced.

2) Appellant contends the controversey exceeds the $25,000 limit imposed on the trial court.

To reach this conclusion, appellant apparently adds the judgment to the homestead exemption of $45,000 which was invalidated.

Plaintiff proceeded under CCP section 704.740 to 704.790, et al, to attempt the sale of appellant's property to satisfy the judgment. The judgment was not increased by the ruling. It remains the same.

3) Appellant contends the trial court was partial toward respondent and biased and prejudicial toward appellant.

No motion was ever made before on or the date of the hearing. The contention is now untimely. Section 170.6 (2) of the Code Of Civil Procedure required written or oral notice be made before the trial court in which said proceeding is pending. It cannot be raised for the first time on appeal.

4) Finally, appellant claims abuse of legal process. Again, in support of this contention, appellant contends that homestead validity and lien and damages in excess

of $25,000 is a matter for the Superior Court jurisdiction. This argument has been responded to under contentions 1 and 2.

For the foregoing reasons, the ruling is affirmed.

DATED: February 20, 1990

BIANCHI, J.

WE CONCUR:

RANDALL, P.J.

KELLY, J.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD G. KASCHAK,
Petitioner,

v.

SUPERIOR COURT, KERN COUNTY
APPELLATE DEPARTMENT,
Respondent,

PINE MOUNTAIN CLUB PROPERTY
OWNER'S ASSOCIATION
Real Pary In Interest

No. F013845
(Sup Ct. No A-415)

BY THE COURT:*

The petition for writ of mandate, certiorari or other appropriate relief is denied. Petitioner has not provided an adequate record in support of the petition. (Cal. Rules of Court, rule 56 (c).) Petitioner has not shown that he was denied a fair hearing or that the questions presented are of great general interest such that review by way of a proceeding for extraordinary relief is required.

Date: May 3, 1990

MARTIN, Acting P.J.

*Before Martin, Acting P.J., Stone (W.A.) J, and Brown J.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD G. KASCHAK,
Petitioner,

v.

SUPERIOR COURT, KERN COUNTY APPELLATE DEPARTMENT,
Respondent,

PINE MOUNTAIN CLUB PROPERTY OWNER'S ASSOCIATION
Real Pary In Interest

No. F013971
(Sup Ct. No. A-415)

BY THE COURT:*

The clerk of this court is directed to strike the PETITION FOR REHEARING AND FINALITY OF JUDGMENT and EXHIBITS OF PETITIONER from this court's file No. F013971 and to place it in this court's file in Richard G. Kaschak v. Superior Court, Kern County, case No. 13845. Said documents are deemed to have been filed in case No. F013845 on May 14, 1990.

Date: May 31, 1990

_____Acting P.J.

MARTIN

*Before Martin, Acting P.J., Stone (W.A.), J.**

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD G. KASCHAK, Petitioner, v. SUPERIOR COURT, KERN COUNTY APPELLATE DEPARTMENT, Respondent, PINE MOUNTAIN CLUB PROPERTY OWNER'S ASSOCIATION Real Pary In Interest	No. F014265 (Sup Ct. No. A-415)

BY THE COURT: 8

The petition for writ of mandate, certiorari or other appropriate relief is denied.

Date: Aug. 9, 1990

_____Acting P.J.

MARTIN

* Before Martin, Acting P.J., Stone (W.A.), J, and Ardaiz, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

FIFTH APPELLATE DISTRICT

NO F014265

S017051

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

RICHARD G. KASCHAK, Petitioner

v.

KERN COUNTY COURT APPELLATE DEPT, Respondent

PINE MOUNTAIN CLUB PROPERTY OWNERS' ASSOCIATION, Real Party In Interest

---

Petition For Review DENIED.

LUCAS

Chief Justice

SUPREME COURT FILED: SEP. 19, 1990
Robert Wandruff Clerk, Deputy

(2)

No. 90-1002

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD G. KASCHAK

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN

Respondent.

PINE MOUNTAIN CLUB PROPERTY
OWNERS ASSOCIATION,

Real Party in Interest.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

B.C. BARMANN
County Counsel
ROBERT D. WOODS
Chief Deputy-Litigation
Counsel of Record
1415 Truxtun Avenue, 5th Floor
Bakersfield, California 93301
(805) 861-2326

Attorney for Respondent,
SUPERIOR COURT OF CALIFORNIA

I.

SUMMARY OF ARGUMENT

Petitioner Kaschak seeks a Writ of Certiorari on the constitutional grounds of claimed due process violations. Petitioner asserts these defects in the original proceedings in the Taft-Maricopa Justice Court of Kern County, in the Kern County Superior Court (sitting in its appellate function), and as to denial of the Petitions for review by the California Court of Appeal, Fifth Appellate District, and the California Supreme Court.

This reply is made by respondent County of Kern on behalf of the Taft-Maricopa Justice Court (now known as West Kern Municipal Court), and the Appellate Division of the Kern County Superior Court. This reply will address

the propriety of the original proceedings in the Taft-Maricopa Justice Court.

Respondent asserts that petitioner was not denied due process for the following reasons:

(1) Petitioner was provided the opportunity to cross-examine adverse witnesses, but failed to avail himself of that opportunity;

(2) the justice court has full discretion under California rules of evidence to hear or refuse to hear oral testimony on motions; and

(3) the declarations relied upon by the justice court were not properly objected to or stricken by petitioner's motion and must therefore be deemed to be competent evidence.

////

////

II.

STATEMENT OF CASE

This action is based upon a civil suit filed in the Taft-Maricopa Justice Court by co-respondent Pine Mountain Club Property Owners Association (hereafter, "the Association"). The Association sued petitioner Richard G. Kaschak for his failure and refusal to pay an increase in the dues assessed to owners of property in the Pine Mountain Club, a private rural residential venture located near Frazier Park, California. The case was decided in favor of the Association, and a judgement was entered in the amount of $11,815.49.

Petitioner's property in the Pine Mountain Club was attached as payment of the judgment. In order to satisfy the judgment against him,

petitioner was ordered to post a bond in an amount equal to twice the judgment or, in the alternative, a writ of sale for the property was to be undertaken.

Petitioner claimed he had a Homestead exemption to the seizing of his property, pursuant to California Code of Civil Procedure section 704.920. The Association filed a Motion to Invalidate the Homestead Application and Application for Order of Sale of Defendant's Dwelling on July 19, 1988. The Motion was originally scheduled to be heard on August 15, 1988.

A copy of the Notice and Motion was filed with the Court and served upon petitioner. The Association attached the Declarations of Debra Tibson Lambrec, attorney for the Association, Mel McColloch and Richard McMillan to the Notice and Motion.

Mr. McMillan was a part time resident of the Pine Mountain Club, and his property was located across the street from petitioner. His declaration was submitted as evidence that petitioner did not reside at his Pine Mountain property on a full time basis.

Mr. McCulloch was the chief operating officer of the Association. His declaration gave evidence that petitioner did not use his Pine Mountain Club address to receive mail and had an address in Hollywood, California.

On August 4, 1988, the hearing was continued to September 12, 1988. Petitioner filed his Opposition to Plaintiff's Motion to Invalidate Homestead on September 7, 1988. Petitioner did not request an opportunity to cross-examine the witnesses who had submitted declarations as evidence in the Association's Motion.

III.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW

Petitioner's claim that he was denied due process in the original hearing is based on the fact that witnesses were not present at the hearing on the Invalidation of the Homestead Claim.

The hearing was duly noticed by the Association and filed with the Taft-Maricopa Justice Court on July 19, 1988, and served upon petitioner.

The reception and consideration of evidence, including oral evidence, in a Law and Motion Hearing is governed by California Code of Civil Procedure section 2009 and the California Rules of Court. Rule 323 states in relevant part as

follows:

> "Evidence received at a law and motion hearing shall be by declaration and affidavit and by request for judicial notice without testimony or cross-examination, except as allowed in the court's discretion for good cause shown or as permitted by local rule. A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, shall file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to introduced and a reasonable time estimate for the hearing..."

Petitioner was aware that there were witnesses against him upon receipt of the Notice of Motion, Motion, and attached Declarations. In his opposition, petitioner attacked the declarations as hearsay but did not seek permission from the justice court at that time or at any time before the hearing to cross-examine the witnesses. Petitioner received the declarations and had ample time to review the declarations and pursue cross-examination. He

did not comply with the procedures set forth in Rule 323(a) for requesting that plaintiff's bring their witnesses to the hearing for the purpose of cross-examination.

The procedures embodied in Rule 323 are authorized by California Code of Civil Procedure section 2009. That section provides in relevant part as follows:

> "An affidavit may be used . . . upon a motion, and in any other case expressly permitted by statute."

Section 2009 has been construed by California courts as empowering any court to determine motions upon declarations alone and to allow the court discretion to refuse oral testimony. Beckett v. Kaynar Mfg. Co. (1958) 321 P.2d 749, 49 Cal.2d 695, 698, n. 3.

California courts have also considered the argument raised by petitioner that reliance on declarations alone to determine motions denies

parties the right to cross-examine adverse witnesses.

California courts have consistently and uniformly rejected this argument.

In the matter of Conservatorship of Jones (1986) 188 Cal.App.3d 306, 232 Cal.Rptr. 600, a California trial court obtained jurisdiction over Jones by the service of a petition for conservatorship on Jones. The court relied on an affidavit of the social worker who had served the petition to determine that service was proper. Jones objected and contended that he should have been allowed to cross-examine the social worker at his conservatorship hearing.

The appellate court responded to Jones's due process argument as follows:

> "Jones's claim of an impaired right to cross-examine the affiant does not dissuade us from this conclusion. The due process protection adhering in the Sixth Amendment is '. . . a personal examination

> "and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that' they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. (Mattox v. United States (1895) 156 U.S. 237, 242-43; accord Ohio v. Roberts (1980) 448 U.S. 56, 63-64; California v. Green (1970) 399 U.S. 149, 157, 158."

Jones, 188 Cal.App.3d at 310. The Jones court went on to hold that Jones had cited no authority that the Sixth Amendment protection offered to criminal defendants extended to proposed conservatees. Id.

Petitioner would have this Court substitute "civil litigant" for "the accused" in the above quotation. Not surprisingly, petitioner cites no authority for his novel proposition.

Further, the cases cited by petitioner in his petition before this Court serve to cut his own

legal throat.

The cases of Goldberg v. Kelly (1970) 397 U.S. 254; Derewecki v. Pennsylvania Railroad Co. (3d Cir. 1965) 353 F.2d 436; Nevels v. Hanlon (8th Cir. 1981) 656 F.2d 372; and Chicago Ridge Theatre Ltd. Partnership v. M&R Amusement Corp, (7th Cir. 1988) 855 F.2d 465 all stand for the proposition that a litigant must have an opportunity to cross-examine adverse witnesses.

As shown above, petitioner was provided that opportunity by Rule 323. Petitioner chose not to avail himself of that opportunity, and his claims of due process violation must be deemed waived.

The justice court reviewed the moving papers of both parties, including the declarations submitted by plaintiffs, as well as hearing oral argument at the hearing and made its order

stating:

> "Evidence both oral and documentary being submitted and arguments heard thereon the court finds as follows:
>
> 1) That there is an overwhelming amount of evidence indicating that the defendants' dwelling in Pine Mountain was not used as his principle place of residence which is one of the essential elements concerning a homestead exemption and the court finds that under C.C.P. 704, et seq, that defendant's homestead declaration is invalid."

It was clearly within the justice court's discretion to weigh the evidence as presented. In this instance the justice court felt the evidence in support of plaintiffs' position was "overwhelming."

////

////

////

////

////

////

IV.

DECLARATIONS WERE PROPERLY RELIED UPON BY JUSTICE COURT IN DETERMINING MOTION

Petitioner further claims that he was denied due proces in that the justice court relied upon hearsay declarations in determining the motion.

Although petitioner attacked the declarations as hearsay, he made no objection to the declarations or a proper motion to strike.

The court in Flood v. Simpson (1974) 45 Cal.App.3d 644, 675, 119 Cal.Rptr. 675 addressed and rejected the same argument raised by petitioner. The appellate court stated that it is well-settled that hearsay or other incompetent evidence in an affidavit, if received without proper objection or motion to strike, is

to be regarded as competent evidence in support of an order or judgment.

Similarly, even if this Court accepts petitioner's assertion that the declarations in support of the justice court's order were hearsay, petitioner's failure to properly object or move to strike such declarations at the hearing waived any defects. The declarations must therefore be deemed to be competent evidence.

V.

CONCLUSION

The Petition for Writ of Certiorari is petitioner's last ditch effort to save his property in Pine Mountain from sale in payment of the judgment rendered by the justice court. He has appealed to every court, including this Court in

a prior Petition for Writ of Certiorari, Supreme Court No. 87-2106, in the October 1988 term. The Petition was denied.

In his first Petition before this Court, petitioner failed to effectively raise the issue of right to cross-examine as an element of due process. Similarly, petitioner failed to seek the chance to cross-examine the witnesses against him during the hearing of the motion. This consistent lack of timely action has plagued petitioner. He seeks once again the indulgence of this Court for the airing of weak excuses for his own failure to adequately undertake his own advocacy.

////

////

////

////

////

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

B.C. BARMANN
County Counsel
ROBERT D. WOODS
Chief Deputy-Litigation
Counsel of Record

Attorneys for Respondent,
COUNTY OF KERN

§ 2009. **[Use of affidavits.]** An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute. [1872; 1927 ch 242 § 1; 1929 ch 493 § 1; 1943 chs 11 § 1, 821 § 2; 1965 ch 299 § 124.] *Cal Jur 3d Actions § 49, Affidavits and Declarations Under Penalty of Perjury §§ 30–32, Decedents' Estates § 1066, Motion*

RULE 323. EVIDENCE AT HEARING

(a) [Restrictions on oral testimony] Evidence received at a law and motion hearing shall be by declaration and affidavit and by request for judicial notice without testimony or cross-examination, except as allowed in the court's discretion for good cause shown or as permitted by local rule. A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, shall file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. When the statement is filed less than five court days before the hearing, the filing party shall serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing.

(b) [Judicial notice] A party requesting judicial notice of material under Evidence Code sections 452 or 453 shall provide the court and each party with a copy of the material. If the material is part of a file in the court in which the matter is being heard, the party shall (1) specify in writing the part of the court file sought to be judicially noticed; and (2) make arrangements with the clerk to have the file in the courtroom at the time of the hearing.

[Source: New]

FILED

Maricopa Taft Justice Court
[illegible]
County of Kern, State of California

Date 12-14-88

By Dail M. Hall
Clerk

MARICOPA TAFT JUSTICE COURT
COUNTY OF KERN, STATE OF CALIFORNIA

Pine Mountain Club Property Owners Association, Inc., Plaintiff, vs Richard G. Kaschak Defendant.	Case No. CJ 193 Rulings of the Court Re: 1) Plaintiff's Motion to Invalidate Homestead and 2) Application for Order of Sale of Defendant's Dwelling

This cause having come on regularly to be heard the 28th day of October 1988, plaintiff appearing by and through their legal representative Art Santana and defendant appearing in propria persona.

Evidence both oral and documentary being submitted and arguments heard thereon the court finds as follows:

1) That there is an overwhelming amount of evidence indicating that the defendant's dwelling in Pine Mountain was not used as his principle place of residence which is one of the essential elements concerning a homestead exemption and the court finds that under CCP704 et seq, that defendant's homestead declaration is invalid.

The court further rules on the application for an order concerning the sale of defendant's property in the affirmative and as follows:

Defendant, Richard G. Kaschak shall file an undertaking double the amount of judgment or in the alternative a surety bond one and one half times the amount of plaintiff's judgment within 30 days: that if no undertaking or bond is filed herein plaintiff shall proceed with the sale of defendant's property as prayed for in their application. Order of sale pursuant to CCP701.510.

Dated: 12/14/88

Judge, Robert C. Deabenderfer

6

(3)

No. 90-1002

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1990

RICHARD G. KASCHAK,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN

Respondent,

PINE MOUNTAIN CLUB PROPERTY
OWNER'S ASSOCIATION

Real Party
In Interest.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

RICHARD G. KASCHAK
1928 Carmen Avenue
Hollywood, Calif.
90068 (business adr.)
(213) 462-8803
Pro Se Petitioner

March 4, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

No. 90-1002

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1990

RICHARD G. KASCHAK

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN

Respondent,

PINE MOUNTAIN CLUB PROPERTY OWNER'S ASSOCIATION

Real Party In Interest.

RESPONSES & ARGUMENT PRESENTED

Respondent's Late "Reply" brief was received February 19, 1991.

On this same date, petitioner wrote and mailed certified letter to Office Of The Clerk, Supreme Court Of The United States, asking if this undated "Reply" brief was in valid full compliance with Rules Of The

Supreme Court, and petitioner's Petition For A Writ Of Certiorari which was accepted & docketed on December 15, 1990.

On February 26, 1991, via telephone, petitioner was informed that respondent's "reply" had been accepted & docketed accordingly.

Thus the county counsel has now filed a "Reply" for the Superior Court to the petition filed herein. As of this writing, the Real Party In Interest, Pine Mountain Club, has not filed a brief, and the time for filing has now expired accordingly. Petitioner wishes however, to reply to the county's brief as provided by Rule 15.6. No factual matter asserted by Petitioner has been controverted. Rule 15.1.

I.

THE OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE WITNESSES IS A RIGHT

The counsel for the Superior Court makes the surprising argument that the provisions of California Rule Of Court 323 are the equivalent of the right to confront and cross-examine witnesses. Brief, p. 6.

Rule 323 permits a litigant to apply for permission to introduce oral evidence at a law and motion hearing upon 3-days written notice to the court. The application is addressed, however, to " the court's discretion for good cause shown..." Rule 323. But the general rule remains that "Evidence received at a law and motion hearing shall be by declaration....without testimony or cross-examination." Rule 323.

But, plainly, Petitioner is asserting a right required by the due process clause as it applies to the States under the Fourteenth Amendment. For the County to argue that petitioner "cut(s) his own throat" because Rule 323 gives him the "opportunity" to cross-examine witnesses, an opportunity petitioner "waived", is specious, if not cynical. (See Brief, p. 11). Clearly, the County seeks to resurrect the discredited distinction between right and privilege, and, to equate the two. It seems plain that if a right depends for its exercise upon judicial discretion, we are not properly speaking of a right at all, but of a privilege. For a right is guaranteed by the Constitution and does not owe its existence to judicial discretion.

It exists independent of the judiciary which must recognize it, i.e., it is a claim on the judiciary and operates as a limitation of the judicial power.

Therefore, the County cannot equate the "opportunity" to apply with the "opportunity" to actually cross-examine. See Brief p. 9. Surely, the County is obfuscating, because Goldberg v Kelly (1970) 397 U.S. 254, and the other cases cited, make clear that "Due Process' requires the opportunity to confront and cross-examine witnesses..." Ibid, at 269. (Emphasis added.)

Furthermore, it must be noted that the rule cited only applies to the introduction of "oral evidence." Rule 323, Brief, p. 7.
There is no provision for obtaining cross-examination and confrontation of witnesses. This interpretation is

buttressed by the rule's requirement that a written statement setting forth the nature and extent of the evidence "be submitted 3 court days before the proposed hearing." This is more easily done with direct testimony than with cross-examination. Afterall, in summary proceedings, such as those contemplated by the Rule, there is No discovery. Because of this, it is almost impossible to predict what evidence cross-examination would elicit. And,additionally, demeanor plays such an important role on cross-examination that falsity can only be detected by the manner of its presentation, not its contents. In short, the additional requirement of a proposed written statement is a needless handicap, if not an impossibility, and in most cases,

a superfluity. Clearly, this right should not be so qualified that it is practically impossible to obtain accordingly.

Finally, the Goldberg requirement is of confrontation itself. That is, wholly apart from what a litigant may think the evidence will be, the litigant has the right to confront the witness, i.e., that is the right to confrontation is distinct from the right to cross-examine, though they are closely related. The point is, of course, that this right to confrontation is not subject to separate considerations of what the witness has to say. The case cannot be tried in absentia. Declarations are no substitute for the witnesses being sworn in open court and identifying their testimony as

their own. Chicago Ridge Theatre Limited Partnership v M & R Amusement Corp., 855 F 2d 465, 468 (7 Cir. 1988).

In sum, it is obfuscatory for the County to equate the opportunity to apply for a hearing with actual opportunity to confront and cross-examine the witnesses. Goldberg, at 268.

For the County to then conclude that by failing to apply for a hearing, the Petitioner "waived" his right to one (Brief, p. 11) turns the record on its head. First, of course, waiver is the relinquishment of a known right; there is no evidence that Petitioner knew of this "right to apply." Secondly, the facts of the petition show that Petitioner asked to cross-examine the witnesses at the hearing.

The County does not dispute this. Rule 15.1. The denial then formed the basis of his appeal. To hold a waiver in this context would simply be dumbfounding.

II.

CALIFORNIA LAW IS NOT DETERMINATIVE

The County, again-almost gymnastically, asserts that California case law and statute permit motions to be determined on declarations alone, (Brief, p. 8) and that California has not interpreted the Sixth Amendment to require cross-examination and confrontation in anything but a criminal action (Brief, p. 10). But, in the first place, the question is one of Federal, not State, law, and secondly, the right claimed here arises under the Fourteenth Amendment; not the Sixth Amendment. Thus the County begs the

question in the first instance (if it doesn't reverse it) and, in the second instance, it misplaces the locus of the guarantee. The County asserts Petitioner cites no authority for its position (Brief, p. 10) but Petitioner, in addition to Goldberg, cited Sniadach v Fairly Finance Corp. Of Bay View, 395 U.S. 337 (1968), which clearly speaks of the right to a hearing, and impliedly of confrontation, as grounded in the "Due Process" Clause of the Fourteenth Amendment even in a civil proceeding. Put differently, the question is of Federal Law, not State Law, and therefore the Supreme Court, not the Court Of Appeal of California (an intermediate appellate court in any event), is the final arbiter.

The State's interpretation must yield to the Supreme Court's; not vice versa.

III.

HEARSAY IS OBJECTIONABLE

Finally, in Point IV of its brief, the County concedes that the Petitioner, In Propria Persona, attacked "the declarations as hearsay, but made no objection to the declarations or a proper motion to strike."Brief, p. 13. Can the county seriously maintain such a fine distinction?
Surely it exalts form over substance to maintain that an attack on hearsay is not the equivalent of an "Objection" to it. It further stretches the logic to then conclude, as the county does (Brief, pp. 13-14), that "incompetent" evidence becomes "competent" upon the failure to

properly object. The county confuses hearsay and competency. Some hearsay, the admissible exceptions, are obviously sufficiently reliable to be considered, and are therefore "competent". Other hearsay, for which, as here, there are no exceptions, is inherently unreliable and, therefore, is incompetent, even if relevant. But this court has held that mere uncorroborated hearsay is not substantial evidence. Consolidated Edison Co. v N. L. R.B., 305 U.S. 197 (1938). That is, this court has held that hearsay even if admitted into evidence cannot by itself be sufficient to support a judgment. Incompetent hearsay does not alchemically change into competent evidence as a function of its acceptance into evidence.

It remains incompetent, unable by itself to prove its contents. This again is a question which must be decided in relation to "Due Process", not to mere rules of evidence. Again, a Federal question, not a State question, is presented, and State law is not, therefore, final.

The matter was put to rest, however, when Justice Brennan held that, where credibility and veracity are at issue, as here, "written submissions are a wholly unsatisfactory basis for decision." Goldberg, supra, at 269. As the only evidence by the Pine Mt. Club Property Owners Association here was by written declarations, it seems plain that the decision of the courts below must be reversed because the evidence does not "satisfy" the Due Process requirements. No State rule, nor court decision can alter these Constitutional requirements.

CONCLUSION

Petitioner, Kaschak was deprived of his right to confront and cross-examine the witnesses against him. The County argues Petitioner had an "opportunity to request" the court to exercise its discretion to allow such a hearing. By not applying, Petitioner waived his right. But Petitioner objected at every stage of this proceeding to being deprived of this right. The California Court rule turns Petitioner's right into a privilege granted on conditions; conditions superfluous to and in derogation of his right. The Court rule is, therefore, unconstitutional. Ample Federal authority exists for Petitioner's right,

a right which cannot be lost by the exercise of State Court discretion or State Court interpretation; a Federal question of general importance is presented herein. Hearsay declarations are offensive to the Constitution and the decision here, based on such declarations alone is itself unconstitutional. The right to confront and cross-examine witnesses whose testimony is used against him before Petitioner is deprived of (homesteaded) real property is a constitutional guarantee. The importance of Petitioner's right and the mere incidental burden on the court argues for a plenary rather than a summary hearing; a hearing denied here.

Additionally, as pointed out in the petition, not only did the Justice Court deny Petitioner the

right to cross-examine witnesses against him, but it then contradictorally and unevenly placed Petitioner under oath and offered him to his adversaries for cross-examination!

Finally, the county does not respond to the points raised in the petition that the denial of "due process" was perpetuated by the Appellate Court which did not refer to, nor pass upon Petitioner's denial of his rights to confront and cross-examine. Also, the court improperly ruled upon Petitioner's claim of judicial impropriety by holding a motion to recuse should have been made before the facts became known. The court misses this point. The hidden issue of whether the court below should have advised

the Petitioner of his right to confrontation and cross-examination, the issue tacitly raised by Petitioner's "proper" claims; is also not addressed. In other words, in a summary forfeiture proceeding, was not the court obliged to not only afford Petitioner the opportunity to cross-examine and confront the witnesses against him, if requested, but also to advise the Petitioner of these rights affirmatively, a la Miranda?

For all the foregoing reasons, and for the reasons advanced in the petition, Petitioner Kaschak asks the Supreme Court Of The United States to reverse the judgment below.

Respectfully submitted,

Richard G. Kaschak

Richard G. Kaschak
In Propria Persona

DATED: March 4, 1991